Supreme Court of the United States

October Term, 1955.

No. 164.

AKRON, CANTON & YOUNGSTOWN R. R. CO., et al.,
Appellants,

v.

FROZEN FOOD EXPRESS, et al.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

BRIEF OF THE APPELLANT RAILROADS IN REPLY TO THE MOTION TO AFFIRM FILED ON BEHALF OF THE UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE.

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Filed: August 30, 1955.

INDEX TO BRIEF.

TABLE OF CASES CITED.

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I.
STATEMENT.

By a motion served on counsel for the Appellant Railroads by United States mail on August 10, 1955, the United States of America and Ezra Taft Benson, Secretary of Agriculture, (hereinafter sometimes referred to as the Government) asked this Court to affirm the order of the Court below which set aside in part an order of the Interstate Commerce Commission. The part of the order of the Commission which was set aside by the Court below, as stated

by the Government in its motion to affirm, directed that a motor carrier, Frozen Food Express, cease and desist transporting without a certificate of public convenience and necessity, dressed or frozen poultry which that carrier had been transporting without an appropriate certificate under the belief that such Commodities were within the so-called agricultural exemption contained in Section 203(b)(6) of the Interstate Commerce Act. In ordering Frozen Food Express to cease and desist from transporting dressed or frozen poultry, the Commission was relying on the provisions of Section 203(b)(6) of the Interstate Commerce Act which plainly indicate that the term "agricultural commodities," while defining an area of for-hire motor carrier transportation that is exempted from economic regulation, is one of severely limited scope, for the term "agriculture commodities" is specifically limited by the words "not including manufactured products thereof".

The Commission, after careful study of the problem, concluded that since dressed and frozen poultry undergo a great deal of processing, most of which is done in large industrial plants operated and manned by non-agriculture people, these commodities are manufactured products of agriculture commodities and not agriculture commodities as such. When this conclusion of the Commission was examined by the Court below, that Court, largely on the basis of the *Kroblin* case,[1] ordered the Commission's ruling respecting dressed and frozen poultry to be set aside.

The immediate question before this Court by reason of the Government's Motion to Affirm is whether or not the order of the Court below should be affirmed without consideration of oral arguments and briefs to be filed by the several interested parties and without any expression of opinion by this Court on the soundness of the legal analysis used by the Court below in setting aside the particular part

1. *Interstate Commerce Commission v. Allen E. Kroblin*, 113 F. Supp. 599 (N. D. Iowa, 1953), aff'd, 212 F. 2d 555 (8th Cir., 1954), cert. denied, 348 U. S. 836 (1955).

of Commission's order. It is the view of these Appellant Railroads that the granting of the Motion to Affirm would extend and make more difficult a problem that has been bothersome to the Commission in administering the Interstate Commerce Act, and which has caused great and widespread uncertainty, confusion, and economic stress among those engaged in transportation activities throughout the nation and to those shipping and handling an almost limitless number of commodities that regularly move in Interstate Commerce, all to the detriment of the establishment and maintenance of a strong and flourishing national transportation system. Further, it is the belief of these Appellant Railroads that a denial of the Motion to Affirm, resulting in the presentation of oral arguments and briefs, would provide the basis for a determination by this Court that would go a long way toward bringing to an end much expensive, time consuming, and uncertainty producing, litigation.

As will be explained, the situation which gives rise to the instant litigation that is now before this Court is one which is peculiarly appropriate for a pronouncement by this Court of a pattern for interpreting the involved statutory language so that the necessity for new litigation will be greatly lessened, if not totally eliminated. Therefore, these Appellant Railroads must earnestly ask that the motion to affirm be denied and that this Court note probable jurisdiction of the case.

II.
ARGUMENT.

A. The Motion to Affirm Is Manifestly Inconsistent With the Position Taken by the Government in the Companion Cases Which Are Before This Court.

It might appear from the tenor of the Government's Motion to Affirm that there is a relatively simple issue involved in this litigation that has already been amply examined by the Court below making further examination by this Court unnecessary and unwarranted. But this is definitely not so.

To properly consider the Motion to Affirm, the issue as to whether the Court below was right in holding that dressed and frozen poultry are agricultural commodities must be viewed and brought into focus against a background of a litigation before the Commission which brought before the Court below not only the dressed and frozen poultry question, and the companion cases now before this Court, which had their beginnings in the litigation before the Commission. If this is done, it will become obvious, these Appellant Railroads believe, that the Government's position in asking this Court to affirm the ruling below is a completely inconsistent one and, as will also be shown, a completely unsound and legally unsupportable one.

Without repeating in detail what has been said in the Railroad's Jurisdictional Statements filed in Numbers 161, 164, it is obvious that the agricultural exemption contained in Section 203(b)(6) of the Interstate Commerce Act is not self-executing and of necessity must be interpreted to determine whether a particular item having an agricultural origin, but subjected to some processing, falls into the category of "agricultural commodities," or the category of "manufactured products thereof." And it takes no vivid or unduly sensitive imagination to think of the vast number

of items that will fall into a twilight zone. Further, because of the limitless number of commodities involved, and the almost imperceptible shades of gradation between one and another, it is equally clear that any attempt on a piecemeal basis to work out a rational and workable interpretation of the Section as it applies to a particular item would be doomed to failure. In short, the Section is one that is bound to cause confusion, uncertainty and highly technical distinctions if applied undependably to separate commodities. The Section is one, therefore, which urgently calls for a pattern of interpretation which is easy of application, sensible in result, and reflective of the over-all objectives of Congress in enacting the legislation of which it is a small, but most important, segment. Perfection of result with respect to individual commodities is less to be desired than general all around workability.

The Commission having found this to be the case after several piecemeal attempts to apply the Section, commenced a general investigation which led to the formulation of interpretative rules. These interpretative rules, which were incorporated in the Commission's report in, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), sometimes referred to as the *Determination* case, outlined the principles to be followed in applying the Section to particular commodities. The report did not stop at that point, but went on and, by applying the rules laid down, classified a considerable number of commodities as falling into the exempt or the non-exempt group. In making its classifications, the Commission placed dressed and frozen poultry in the list of manufactured items because of the extensive off-the-farm processing to which such items are subjected. In today's economic scheme, the raising of poultry is still an agricultural pursuit, but the dressing and freezing of these farm products is in every respect an industrial or manufacturing activity. The processing of the birds for market is done in large industrial plants that employ workers who are no closer to the farm than those who work in canning

factories. Most of the work is done on an assembly-line basis and there is an extensive use of stabilized machinery.

Frozen Food Express, a motor carrier that had been handling, without a certificate of convenience and necessity, several items which the Commission found to be in the non-agricultural group in the *Determination* case, in an appropriate proceeding[2] ordered the Commission to cease and desist from handling dressed and frozen poultry and other items until it secured a certificate. The sole basis for this holding of the Commission was the findings made in the *Determination* case.

Frozen Food Express, aggrieved by this order of the Commission, subjected it to Court test in the three-judge Court that sat below and at the same time, in order to test the underlying findings made in the *Determination* case, also asked the Court below to review that matter.

The Court below ruled that the Commission's order in the *Determination* case was non-reviewable, but, at the same time, ruled that the Commission's order respecting the transportation of dressed or frozen poultry by Frozen Food Express—which was grounded solely on the findings made in the *Determination* case—was reviewable. Upon review, the Court below set aside that order of the Commission.

Frozen Food Express, the Commission, interested associations of motor carriers, and these Appellant Railroads, in appeals numbered respectively 158, 159, 160, 161, have asked this Court to review the order of the Court below holding that the *Determination* case was not reviewable. The Government, while not joining in these appeals, argued below that the Commission's order was reviewable and has not, so far as these Appellant Railroads have learned, opposed these appeals in this Court. Thus, it can be said that the Government acquiesced in the position of the other Appellants and does not oppose a complete review by this

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2. *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, 62 M. C. C. 646 (1954).

Court of the *Determination* case, such review to include, it must be supposed, oral argument and briefs.

But at the same time the Government, while acquiescing in a complete review of the all-comprehensive *Determination* case, has asked that review be foreclosed with respect to dressed and frozen poultry which is one of the many items covered by the *Determination* case. Apart from the inconsistency of this, the course of action asked for by the Government might be productive of the most unusual result of having this Court, in what are in every sense companion cases, reverse the ruling made on the Motion to Affirm upon the conclusions reached after hearing arguments and studying the briefs in the *Determination* case. Logically and practically, the better course to follow is for this Court to withhold ruling on the dressed and frozen poultry items until it has had an opportunity to decide what should be done with the *Determination* case. If it is decided to review the *Determination* case, the dressed and frozen poultry items will be encompassed in that review. On the other hand, if this Court decides that the Court below was right and the *Determination* case is non-reviewable, it can then decide whether the Court's below ruling respecting dressed and frozen poultry was appropriate or otherwise.

B. The Government's Motion to Affirm Is Improperly Supported by Cases Arising Under Statutes Other Than the Interstate Commerce Act.

At pages 5, 6, and 7 of the Government's Motion to Affirm it is argued that the holding of the Court below respecting the status of dressed and frozen poultry under Part II of the Interstate Commerce Act is consistent with holdings of this Court involving the classification of items as "manufactured" under other statutes and, for that reason, the Motion to Affirm should be granted. If this summary of the position of the Government as set forth in this part of the motion is a correct one, then its statement alone

should be enough to demonstrate the inadequacy of the Government's contentions.

The Interstate Commerce Act is one of the most comprehensive pieces of regulatory legislation ever enacted by Congress. As such, it governs, deals with, and touches practically every activity of the many and varied enterprises that are brought under the Commission's jurisdiction. The delicate interrelationships between the several sections of this gigantic piece of legislation, and their effects on the most intricate and complicated workings of the regulatory processes as they affect an industry that is in some senses of the variety of public utilities and in other senses fully competitive, makes it completely inappropriate to attempt to interpret the individual sections of this Act according to precedents governing entirely different legislation.

In this connection, it would seem to be readily apparent that the cases cited on pages 6 and 7 of the Motion to Affirm do not support the proposition that poultry which has been dressed and frozen is not "manufactured." The word "manufactured" will be subject to different interpretations depending upon the way it is used in a particular statute and upon the purpose for which the particular statute was passed. In the *Dudley* and *Wiegmann* cases cited by the Government, the issue was whether or not certain articles were "manufactured" so as to be subject to an import duty. In determining such an issue, not only the wording of the statute, but its purpose and the general rules of statutory construction applicable to it would be factors to be considered. For example, in considering such a statute, if there is a doubt as to whether or not a particular article is subject to a duty, such doubt must be resolved in favor of the importer. *Hartranft v. Wiegmann*, 121 U. S. 609 (1887).

Entirely different considerations are brought into play in interpreting Section 203(b)(6) of the Interstate Commerce Act. The descriptive words of the exemption were

purposely left indefinite so that the Section could be interpreted by the Commission in accordance with the policy and other provisions of the Act. 79 Cong. Rec. 12205, 12207. However, there was some indication by Congress of the policy which led to the enactment of the exemption in that it was primarily to benefit farmers who hauled their own farm products and not for the benefit of commercial truckers. 79 Cong. Rec. 12213-12215. In addition, the rule of statutory construction which governs the interpretation of this exemption is that exceptions from the provisions of remedial legislation are to be strictly construed. *Piedmont & N. Ry. Co. v. Commission*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938). Thus, it seems clear that decisions holding certain articles to be "manufactured" under a variety of statutes, embodying entirely different governmental policies, are neither binding nor even persuasive in determining how exceptions for the regulating powers of the Commission should be interpreted.

C. The Kroblin Case, Relied Upon by the Government as Support for Its Motion to Affirm, of Itself Demonstrates the Need for Complete Review by This Court of the Ruling of the Court Below.

It cannot be gainsaid that the court below, in holding that dressed and frozen poultry are "agricultural commodities" as this term is used in Section 203(b)(6) of the Interstate Commerce Act, did so entirely upon the *Kroblin* case. Referring to the *Kroblin* case, Judge Connally said:

> "Judge Gavin concluded that dressed poultry constituted an 'agricultural commodity' and did not constitute a 'manufactured product thereof'. Hence such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry."

Because of this and the Government's very heavy reliance on the *Kroblin* case to support its Motion to Affirm,

the issue before this Court in this particular appeal in the final analysis is narrowed very greatly. The primary consideration of this Court should be whether the simple affirmance of the decision below will bring an end to a problem that to date has been the source of most unsatisfactory litigation. If it will not, and a complete review of the holding below—and incidentally of the *Kroblin* case—will provide a pattern for bringing to an end extensive litigation, then it is most appropriate, and indeed necessary, these Appellant Railroads believe, that such complete review be afforded.

It is, of course, clear that review of the lower Court's holding in the instant case is not precluded by the fact that this Court denied certiorari in the *Kroblin* case. In the first place, it has frequently been stated that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Atlantic Coast Line R. Co. v. Powe,* 283 U. S. 401 (1931); *Sunal v. Large,* 332 U. S. 174 (1947). Secondly, although this court may have felt at the time of the *Kroblin* case that the time was not ripe for consideration of the agricultural exemption, it would seem that under the circumstances which presently exist this Court should at this time undertake a full review. This Court now has before it the *Determination* case, which raises the whole question of the interpretation to be placed upon the exemption and thus has an opportunity to examine the question on a comprehensive rather than a piecemeal basis.

A careful reading of the *Kroblin* case establishes beyond refutation that the interpretation of the agricultural exemption when attempted on a piecemeal basis has resulted in decisions both by the Commission and by the courts which are conflicting, confusing, and beyond reconcilation. Further, the *Kroblin* case makes it clear almost beyond argument that the legislative history of Section 203(b)(6) provides little or no help in interpreting the Section. That these observations are correct is demonstrated by the fact that neither the courts nor the Commis-

sion have found the *Kroblin* case to be authoritative concerning subsequent questions involving the exempt status of other commodities. *Southwest Trading Co. v. U. S.*, 208 F. 2d 708 (5th Cir. 1953); *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, 62 M. C. C. 646 (1954); and *Allen Kroblin, Inc., Extension—Dairy Products*, Docket No. MC-C-70252 (Sub. No. 3) (I. C. C. April 1955).

The crux of the problem, the point at which divergence of opinion begins, is brought to light by the lower court's discourse in the *Kroblin* case. There the court bases its decision upon what it believes to be the proper principle to be used in interpreting Section 203(b)(6) of the Act and reverses the ruling of the Commission because it was the view of the court, in contradistinction to that of the Commission, that the agricultural exemption should be given a broad or liberal interpretation, that is, all doubts should be resolved in favor of the exempt status.

The Commission, on the other hand, was of the opinion that the exemption in Section 203(b)(6), being one contained in remedial legislation, should, as this Court has said with respect to other exemptions in the Interstate Commerce Act, be narrowly construed. In the words of the District Court in the *Kroblin* case (113 F. Supp. 599-630):

> "The construction or interpretation of Section 203(b)(6) contended for by the Interstate Commerce Commission would be highly restrictive of the scope of Section 203(b)(6) so far as poultry is concerned."

A review of the cases in the several circuits dealing with the agricultural exemption indicates that in some instances the courts have approved the Commission's rulings respecting particular commodities, and in doing so have approved the Commission's use of the strict construction of the exemption, e.g., *I. C. C. v. Weldon*, 90 F. Supp. 873 (W. D. Tenn. 1950), aff'd, 188 F. 2d 367 (6th Cir. 1951), cert. denied, 342 U. S. 827 (1951); *Southwest Trading Co. v. U. S.*, 208 F. 2d 708 (5th Cir. 1953). In other instances, courts have disapproved the Commission's holdings

upon the basis that the Commission improperly strictly construed the exemption rather than applying a liberal interpretation, e.g., *I. C. C. v. Kroblin, supra; I. C. C. v. Yeary Transfer Co.*, 104 F. Supp. 245 (E. D. Ky. 1952), aff'd, 202 F. 2d 151 (6th Cir. 1953).

Regardless of which construction—*i.e.*, the strict or the liberal—is to be utilized, it necessarily follows that one of the two must be discarded if the Commission is to sensibly administer the Act. But the Commission cannot be expected to decide which of conflicting court cases, each of the same authority, is to be followed. Direction must come from above.

The Commission's action in applying a strict construction to Section 203(b)(6) is supported by the decisions of this Court interpreting other exemptions from the Interstate Commerce Act. *Piedmont & N. Ry. Co. v. I. C. C.*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. U. S.*, 316 U. S. 74 (1942); *Crescent Express Lines v. U. S.*, 320 U. S. 401 (1943); whereas the decisions of the courts that have overruled the Commission are directly contrary to this established line of cases. If this Court affirms the Court below without going into the question of the proper rules for construing Section 203(b)(6), the Commission, those in the transportation industry, and those that utilize regulated carriers and carriers claiming exemption from regulation, will be left in the dark as to whether this Court is merely affirming the result of the lower court's decision, or is putting its stamp of approval on the principles of law on which that decision rests. The confusion that presently exists will go on.

The time has come when the need is manifest for an authoritative pronouncement as to which rule of construction is proper, and the matter is patently ripe for determination. These Appellant Railroads, that have a vital and increasingly important stake in the question, respectfully ask that this Court deny the motion to affirm and that it note probable jurisdiction of the matter so that the case can be fully briefed and argued.

III.

THE RELIEF REQUESTED.

For the reasons more fully developed before, these Appellant Railroads most respectfully ask that the motion to affirm filed on behalf of the United States of America and Ezra Taft Benson, Secretary of Agriculture, be denied and that this Court note probable jurisdiction of the matter.

Respectfully submitted,

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IV.

CERTIFICATE OF SERVICE.

I, Carl Helmetag, Jr., one of the attorneys for the Appellant Railroads, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief of the Appellant Railroads on the several parties to this action as follows:

1. On Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq. and Leroy Hallman, Esq., First National Banking Building, Dallas, Texas.

2. On the Secretary of Agriculture, by mailing copies in duly addressed envelopes with postage prepaid, to his attorneys, Honorable Robert L. Farrington, Honorable Neal Brooks, and Honorable Donald A. Campbell, United States Department of Agriculture, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with postage prepaid to its attorney, Honorable Leo H. Pou, Office of the Interstate Commerce Commission, Washington 25, D. C.

4. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, Honorable Simon E. Sobeloff, the Solicitor General of the United States, Honorable Stanley N. Barnes, Assistant Attorney General, and Honorable Daniel Friedman, Special Assistant to the Attorney General, United States Department of Justice, Washington 25, D. C. and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney or record, Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.

5. On several interested parties, by mailing copies in duly addressed envelopes with postage prepaid to their respective attorneys of record, to wit: David G. MacDonald, Esq. and Francis W. McInerny, Esq., Commonwealth Building, 1625 K Street, N. W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N. W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C., and by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

This 30th day of August, 1955.

CARL HELMETAG, JR.